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STATE OF MICHIGAN

IN THE SUPREME COURT

JONES FAMILY TRUST, Plaintiff/Appellant, and SYLVIA JONES & BOBBY JONES, Plaintiffs, v SAGINAW COUNTY LAND BANK AUTHORITY and ROHDE BROS. EXCAVATING, INC., Defendants/Appellees, and CITY OF SAGINAW and HARDHAT DOE, an Unknown Employee, Defendants.	Supreme Court Case No: 155863 Court of Appeals Case No: 329442 Lower Court Case No.: 13-019698-NZ-2 HON. ROBERT L. KACZMAREK

PHILIP L. ELLISON (P74117)
Attorney for Plaintiffs/Appellants
P.O. Box 107
Hemlock, MI 48626
989/642-0055

GREGORY W. MAIR (P 67465)
ROBERT A. JORDAN (P73801)
Atty for Defendant/Appellee
ROHDE BROS. EXCAVACTING, INC. and
SAGINAW COUNTY LAND BANK AUTHORITY
300 St. Andrews Road, Suite 302
Saginaw, Michigan 48638
989/790-0960

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PROOF OF SERVICE

AMBER HOLLEY, being duly sworn, deposes and says that she is an employee in the offices of O'Neill, Wallace & Doyle and that on the 20th day of June, 2016, she served Appellees Response to Appellant's Application for Leave to Appeal to the Michigan Supreme Court upon: Philip Ellison, Attorney at Law, P.O. Box 107, Hemlock, MI 48626 by regular mail, with postage fully prepaid thereon and depositing said envelope and its contents in an official United States Mail receptacle.

AMBER HOLLEY

Subscribed and sworn to before me, a Notary Public, this 20th day of June, 2017.

Karrie L. Kamp, Notary Public
Saginaw County, Michigan
My Commission Expires: 06-05-20
Acting in Saginaw County

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Attorney for Plaintiffs/Appellants
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Hemlock, MI 48626
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ROBERT A. JORDAN (P73801)
Atty for Appellee ROHDE BROS. EXCAVACTING, INC.
and (SAGINAW COUNT LAND BANK AUTHORITY)
300 St. Andrews Road, Suite 302
Saginaw, Michigan 48638
989/790-0960

APPELLEES ROHDE BROS. EXCAVATING, INC AND SAGINAW COUNTY LAND BANK AUTHORITY'S ANSWER TO APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT IDENTIFYING OPINION APPEALED FROM AND RELIEF SOUGHT

Appellant's Application for Leave arises from the Court of Appeals April 20, 2017 Opinion affirming the trial court's Order(s) dated August 29, 2014, September 29, 2014 and September 22, 2015. The Michigan Supreme Court has discretion to review and deny Appellant's Application for Leave pursuant to MCR 7.303(B)(1) and 7.305.

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COUNTER STATEMENT OF QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS CORRECTLY AFFIRM THE TRIAL COURT'S DISMISSAL OF APPELLANT'S INVERSE CONDEMNATION CLAIMS?

The Plaintiffs/Appellant answers: No.

The Appellees answers: Yes.

The Court of Appeals answered: Yes.

II. DID THE COURT OF APPEALS CORRECTLY AFFIRM THE TRIAL COURT'S ORDER APPLYING THE *PRICE v HIGH POINTE OIL COMPANY* MEASURE OF DAMAGES FOR APPELLANT'S BREACH OF THIRD-PARTY CONTRACT CLAIM?

The Plaintiffs/Appellant answers: No.

The Appellee answers: Yes.

The Court of Appeals answered: Yes.

III. DID THE COURT OF APPEALS CORRECTLY AFFIRM THE TRIAL COURT'S ORDER THAT DEPRECIATION IS AN ELEMENT OF DAMAGES, WHICH MUST BE PROVED BY THE PLAINTIFF?

The Plaintiffs/Appellant answers: No.

The Appellee answers: Yes.

The Court of Appeals answered: Yes.

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INTRODUCTION

The instant Application must be denied as there are no unique issues presented or errors by the lower courts warranting any review by this Honorable Court. In its simplest terms, Appellant is merely a victim of its own failure to be prepared to try its case pursuant to the well-established precedent from this Honorable Court. Appellant is now attempting to benefit from its failure by unnecessarily dragging the Appellees through a protracted appeals process to avoid the inevitable conclusion made by lower courts that it is the architect of its own destruction.

This appeal is the result of a $20,000.00 Consent Judgment on Appellant's Breach of Third Party Contract claim set forth Appellee Rohde Bros. Excavating, Inc. ("Rohde Bros.) for property damage to Appellant's residence allegedly resulting from demolition of a neighboring property located at 343 S. 5th Avenue, Saginaw, Michigan. It is undisputed that the Appellant proposed the Consent Judgment and stipulated to entering the same, so it could immediately pursue a Claim of Appeal solely on the Breach of Contract Claim with respect to the measure of damages being limited to either the cost of repair or the difference in fair market value pursuant to the standard set forth by this Honorable Court in *Price v High Pointe Oil Company, Inc.*, 493 Mich 238, 828 NW2d 660 (2013). Importantly, this stipulation was made in exchange for dismissing all other parties and claims instead of proceeding to trial.

Despite this stipulation, Appellant's Brief in the Court of Appeals added arguments that the trial court also erred by dismissing Appellant's Inverse Condemnation claim against Appellee Saginaw County Land Bank Authority ("Land Bank") and by finding that depreciation is an element of damages that Appellant must prove. Specifically, Appellant argued that not only did the measure of damages in *Price* not apply to its contract claim, but that it should be unjustly enriched by being placed in a better position than it was had the alleged damage never occurred. Appellant further argued that the Land Bank inversely condemned its property through

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affirmative actions aimed directly at its property despite the fact that the Land Bank carried out no actions aside from its mere ownership of the neighboring blighted house. The Court of Appeals was not swayed by Appellant's unsupported and contradictory arguments, and it correctly affirmed the trial court's Orders. Consequently, the instant Application must be denied.

STATEMENT OF FACTS

The salient facts are that Appellee Land Bank Authority owned the property located at 343 S. 5th Avenue. *See Exhibit 2*, Permit for Demolition. Appellant's Amended Complaint alleges that the City of Saginaw and Appellee Land Bank agreed that the demolished property violated the City's Dangerous Building Ordinance. *See Exhibit 1*, p. 2. Consequently, the City was issued Federal block grants utilized for demolishing condemned and abandoned homes in the area; to demolish the property owned by Appellee Land Bank.

Importantly, the City, not Appellee Land Bank, is the governmental entity authorized to enforce the City of Saginaw's Dangerous Building Ordinance. The City was further solely responsible for the demolition of the adjacent property owned by Appellee Land Bank pursuant to the MOU between the City and Appellee Land Bank. Pursuant to its obligations set forth in the MOU, the City solicited bid proposals for demolition of the 343 S. 5th Avenue property. *See Exhibit 3*, Request for Sealed Bid Proposal.

The Appellee Rohde Bros. bid the demolition project and was the contractor assigned to perfect the demolition process from start to finish on behalf of the City. *See Exhibit 2*; *Exhibit 3*. On September 18, 2012, the demolition took place during which time a piece of roof slid down and made contact with the side of the Appellant's property. *See Exhibit 1*, paragraph(s) 16-17. The impact took place near the top of the Appellant's two story residential structure.

Contrary to Appellant's allegations, the alleged damage from the contact was limited to

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the exterior siding, as well as an outdoor flood light on the Appellant's property. Despite the minimal damage, the Appellant alleges that the subject property, which is located in downtown Saginaw, is a total loss and must be rebuilt. *See Exhibit 1*.

After the impact, the Appellant continued to reside in the home until November of 2012. *See Exhibit 4*, Deposition of Sylvia Jones, p. 72, line(s) 12-15. The Appellant contacted Troy O'Neill of Gohm Insurance Restoration to conduct an inspection of the Appellant's subject property. *See Exhibit 5*, Deposition of Troy O'Neill, p. 11, Line(s)11-21. Mr. O'Neill could not relate any damage he observed to the demolition carried out by the Appellee Rohde Bros. *See Exhibit 5*, p. 11, Line(s) 11-21. Mr. O'Neill further never made any representations that Appellant's house was condemned, or that any serious structural damage had been done to the Appellant's property. *See Exhibit 5*, p. 15, Line(s) 4-9.

In November of 2012, over a month after the impact occurred, the Appellant voluntarily terminated the utilities for the subject property and transferred the utilities to a different property that the Appellant owned. *See Exhibit 4*, p. 70, line(s) 9-19. This voluntary act was due to increased heating costs. Appellant then vacated the subject property and moved into the other property they owned, to which they transferred the utilities in November of 2012. *See Exhibit 4*, p. 70-71, line(s) 24-2, 1.

During the winter of 2012-2013, Appellant's unheated property at 339 S. 5th Avenue went through a severe frost heave, which impacted the entire property, including the dirt crawl space. As such, Appellant alleges that the subject property was damaged requiring a total tear down and rebuild of the house.

PROCEDURAL HISTORY

Appellant subsequently filed its Complaint and Amended Complaint against various defendants, including but not limited to Appellees Land Bank and Rohde Bros. alleging, among

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other claims, inverse condemnation, under state and federal law, and breach of third-party contract respectively. *See Exhibit 1*. It is clear however, that Appellant voluntarily vacated the subject 339 S. 5th Avenue property over a month after the impact occurred and terminated the utilities.

Appellee Land Bank filed Motions for Summary Disposition, which included but were not limited to dismissing Appellant's inverse condemnation claims. The trial Court then issued Opinion and Order(s) granting the motions and dismissing Appellee Land Bank from Appellant's entire Complaint. *See Exhibit 6*, Opinion and Order, dated August 29, 2014; *Exhibit 7*, Opinion and Order, dated September 29, 2014. Specifically, the trial court found that there were no actions by Appellee Land Bank that directly and naturally resulted in damage to Appellant's property pursuant to the MOU with the City *See Exhibit 6*; *Exhibit 7*.

Appellee Rohde Bros. subsequently filed Motions in Limine requesting that the trial court prohibit Appellant from admitting any argument, evidence and/or testimony with respect to cost of replacement and restoration of the subject property as the same are irrelevant for determining causation and/or fair market value for the subject property. This included prohibiting the admission of Appellant's expert's opinion on cost for replacement and bringing the subject house up to current building codes. *See Exhibit 8*, Appellee Rohde Bros.' Motions in Limine, dated July 23, 2015.

The trial court granted the above-referenced Motions in Limine for both the negligence and breach of third-party contract claims, and it correctly found that replacement cost for the subject property is inadmissible under both MRE 402 and MRE 403 as it has no tendency to make any fact with respect to the fair market value of the subject property more or less probable. *See Exhibit 9*, Opinion and Order, dated August 31, 2015. Specifically, the trial court found that the correct measure of damages for the negligence and breach of contract claims is the difference

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in the fair market value of Appellant's property before and after the subject demolition as Appellant admitted that the cost of repair exceeded the value of the property. *See Exhibit 9*. As such, the trial court correctly granted the above-referenced motions. Consequently, Appellant's Claim of Appeal should be denied, and this Honorable Court should affirm the trial court.

Interestingly, instead of proceeding to trial, Appellant through its counsel offered to dismiss the other parties and all its claims, with the exception of the breach of third-party contract claim against Appellee Rohde Bros., in exchange for stipulating to entry of judgment solely against Appellee Rohde Bros. for the amount of $20,000.00 with respect to the third-party contract claim. *See Exhibit 10*, Order, dated September 22, 2015.

Appellant subsequently pursued its claim of appeal. Briefs were filed with the Michigan Court of Appeals. After hearing oral arguments on April 14, 2017, the lower court issued an opinion, dated April 20, 2017. *See Exhibit 11*, Court of Appeals Opinion, April 20, 2017. The lower court affirmed the trial court's orders. Specifically, the lower court found that there was nothing in the record supporting a conclusion that Appellee Land Bank performed any "affirmative actions aimed directly at Appellant's property. *See Exhibit 11*, p. 4(*citing Marilyn Froling Revocable Living Trust*, 283 Mich App.at 295). The lower court also concluded that the demolition of the neighboring property did not lead to any unintended consequences to find that *Peterman v Dep't of Natural Resources*, 446 Mich 177 (1994) did not apply. *See Exhibit 11*, p. 5.

With respect to the breach of contract claim against Appellee Rohde Bros., the lower court correctly affirmed the trial court's order that the proper measure of damages is the cost of repair or the difference in fair market value if the cost of repair exceeds fair market value pursuant to *Price v High Pointe Oil Co, Inc*, 493 Mich 238 (2013). *See Exhibit 11*, p. 5. Importantly, the lower court could not find any authority to support the Appellee's requested

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measure of damages. *See Exhibit 11*, p. 6. The lower court further found that the contract at issue imposed a duty analogous to the duty to act with care. *See Exhibit 11*, p. 6. Finally, the lower court correctly found that the trial court did not err in determining that depreciation constituted an element of damages to be proved the Appellant as opposed to an affirmative defense. *See Exhibit 11*, p. 6-7.

STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a Motion for Summary Disposition, a determination that an action is time barred and questions of statutory construction. *Ostroth v Warren Agency GP, LLC*, 474 Mich 36, 40, 709 NW2d 589 (2006). The decision whether to admit or exclude evidence or facts is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Kochoian v. Allstate Ins. Co.*, 168 Mich App 1, 12, 423 NW2d 913 (1988).

LAW AND ARGUMENT

I. THE COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S DISMISSAL OF APPELLANT'S INVERSE CONDEMNATION CLAIMS.

Despite the fact that Appellant's Claim of Appeal arises from the September 22, 2016, entered solely against Appellee Rohde Bros., Appellant's Brief set forth an appeal of the trial court's September 29, 2014, Order granting Appellee Land Bank's Motion for Summary Disposition with respect to Appellant's inverse condemnation claims under the Michigan and U.S. Constitutions.

A cursory review of Appellant's Brief on Appeal however, establishes that Appellant is only challenging the trial court's September 29, 2014 Order with respect to dismissal of Appellant's federal inverse condemnation claim pursuant to the Fifth and Fourteenth Amendment. The Order dismissing Appellant's inverse condemnation claim pursuant to Art. X, Sec. 2 of the Michigan Constitution is not referenced, whatsoever, in Appellant's Brief.

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As such, the dismissal of Appellant's inverse condemnation claim under the Michigan Constitution is not subject of Appellant's instant Application. Consequently, Appellees' Response will focus on why the trial court correctly dismissed the federal inverse condemnation claim against Appellee Land Bank pursuant to the Fifth and Fourteenth Amendments of the U.S. Constitution.

A. The Land Bank's Actions Do Not Constitute A "Taking" To Support A Claim For Inverse Condemnation.

Both state and federal constitutions prohibit the taking of private property without just compensation. *Ligon v City of Detroit*, 276 Mich App 120, 124, 739 NW2d 900 (2007)(citing U.S. Const. Am. V. Inverse condemnation is a cause of action instituted by a landowner whose property has been *taken* for public use without commencing a condemnation proceeding. *Blue Harvest v Department of Transportation*, 288 Mich App 267, 277, 7992 NW2d 798 (2010) (emphasis added). In other words, Appellant must establish that Appellee Land Bank's alleged *actions* amount to a constitutional "taking" of property. *Dep't of Transp v. Tomkins,* 481 Mich 184, 203; 749 NW2d 716 (2008) (emphasis added).

The record evidence clearly establishes that Appellee Land Bank's alleged actions do not constitute a "taking" for the purposes of Appellant's inverse condemnation claim under the Michigan Constitution. "The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." *Lingle v Chevron USA, Inc.*, 544 US 528, 537 (2005).

"While there is no exact formula to establish a de facto taking, there must be some action by the government *specifically directed toward the plaintiff's property* that has the effect of limiting the use of the property" (emphasis added) (internal quotations omitted). *Blue Harvest supra*, at 277 (*quoting Dorman v Clinton Twp*, 269 Mich App 638, 645, 714 NW2d 350 (2006)). Appellant must establish that (1) the government's actions were a substantial cause of the decline

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of the property's value and (2) that the government abused its powers in affirmative actions directly aimed at the property. *Id.* (*citing Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 548, 688 NW2d 550 (2004)). Appellant must further prove a causal connection between Appellee Land Bank's actions and the alleged damages. *Id.* Moreover, any partial destruction or diminution of value to the property by an act of the government must directly, and not merely incidentally, affect the property to establish a taking. *Id.*

Appellant, albeit creatively but ultimately incorrectly, relies on *Peterman v Dep't of Natural Resources*, 446 Mich 177, 191, 521 NW2d 499 (1994) and the unpublished opinion from the lower court in *Estate Dev Co v Oakland County Rd Comm'n,* Docket No. 273383 (Mich App 2007) in an attempt to establish a taking by Appellee Land Bank. However, neither case is applicable.

In *Peterman supra*, the this Honorable Court found that the Michigan Department of Natural Resources' ("DNR") construction of a boat launch ramp with jetties on its property, which depleted the beach and shoreline in front of the plaintiff's property. *Peterman supra* at p. 180-181. Appellant's Brief herein relies on *Peterman* to argue that it is making a "destructive forces" inverse condemnation claim. Appellant misstates the holding *Peterman* as this Honorable Court merely held that the DNR's actions constituted a taking, although it did not physically invade plaintiff's property, because its actions of constructing a boat launch ramp and jetties on its property caused the erosion to plaintiff's property. *Id.* at p. 191.

Similarly in *Estate Dev Co v Oakland County Rd Comm'n,* the lower court found that the defendant's direct actions of cutting trees and brush for a road commission project, which caused a culvert near plaintiff's property to be blocked by debris resulting in flooding on plaintiff's property could constitute a taking. *Estate Dev Co. supra*, at p. 3. As such, the lower court found that defendant's actions of cutting trees and brush may establish a taking without physically

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invading plaintiff's land by setting into motion the destructive forces that resulted in the flooding of plaintiff's property. *Id.*

Herein, Appellant alleges that the "destructive forces" Appellee Land Bank set in motion caused the demolition to the adjacent blighted property, which resulted in damage to Appellant's property. Appellant goes on to state that it was Appellee Land Bank's subcontractors (i.e. Rohde Bros. Excavating, Inc.) who carried out the subject demolition, which allegedly resulted in damage to Appellant's property.

Contrary to the allegations set forth in Appellant's Brief, the record herein is devoid of any facts establishing that Appellee Land Bank's direct actions set into motion any "destructive forces" that caused the damage alleged in Appellant's Complaint. Specifically, Appellee Land Bank was not responsible for the subject demolition, nor was Appellee Rohde Bros. a subcontractor of Appellee Land Bank.

B. The Memorandum Of Understanding ("MOU") Between Appellee Land Bank And The City Clearly Establishes That Appellee Land Bank's Actions Did Not Set Into Motion Any Destructive Forces To Constitute A "Substantial Cause" Of Any Alleged Damage To Appellant's Property, Nor Were Any Of Appellee Land Bank's Alleged Actions Affirmatively Aimed At Appellant's Property.

It is undisputed herein that Appellee Land Bank did not actually administer or perfect any demolition of the adjacent property. As such, no action taken by Appellee Land Bank, appropriated, invaded, interfered, directly aimed any actions at or took any portion of Plaintiffs' property. Further, it cannot be disputed that the alleged actions of Appellee Land Bank, in no way, set into motion any destructive forces in motion to substantially cause any alleged damage to Appellant's property.

Appellant grossly misstates Appellee Land Bank's role with respect to the subject demolition as Appellee Land Bank's only involvement in this matter was its ownership of the adjacent blighted property. As such, the actions of Appellee Rohde Bros. cannot be imputed to

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Appellee Land Bank. Indeed, it was the City, not Appellee Land Bank that was exclusively authorized to enforce the City of Saginaw's Dangerous Building Ordinance. Moreover, the City was solely responsible for the rehabilitation and demolition of properties acquired by Appellee Land Bank, as well as subcontracting the demolition process pursuant to the Dangerous Building Ordinance, and the MOU between the City and Appellee Land Bank.

This is reflected in paragraph(s) two (2) and seven (7) of the MOU, which state as follows:

> 2. Article 4 – Property Rehabilitation, is amended to state the parties agree that the CITY is solely responsible for new construction and the rehabilitation of NSP 2 properties acquired by the LAND BANK AUTHORITY. The CITY'S responsibilities include, but are not limited to, hiring the contractors, overseeing construction and paying for the rehabilitation activities. The LAND BANK AUTHORITY will assist in paying for a portion of the new construction and rehabilitation activities. However, the CITY is responsible for administering the process.
>
> ***
>
> 7. Article 18 – Demolition, is a new provision that states the parties agree that the CITY is solely responsible for the demolition of NSP 2 properties acquired by the LAND BANK AUTHORITY and pursuant to the CITY'S Dangerous Building Ordinance. The CITY'S responsibilities include, but are not limited to, hiring the contractors, overseeing demolition work and paying for demolition activities. The LAND BANK AUTHORITY will assist in paying for a portion of the demolition activities. However, the CITY is responsible for administering the process.

See Exhibit 12, Memorandum of Understanding.

If Appellant did not consider the City's actions of solely administering the demolition process a "taking," then Appellee Land Bank's actions clearly do not establish a "taking" when Appellee Land Bank merely acquired the blighted, adjacent property prior to the City perfecting its demolition. Holding Appellee Land Bank, liable for a "taking" when it merely owned the adjacent property that was demolished would be like holding the Budweiser Corporation liable for a dram shop action where a local bar owner served a patron Bud Light.

As such, Appellee Land Bank's actions were not casually connected to Plaintiffs' alleged

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damages as Appellee Land Bank was clearly not responsible for any part of demolishing the adjacent property. It is further undisputed that the contract for the subject demolition was between the City and Appellee Rohde Bros., so any subcontractors for the demolition would be subcontractors of the City, not Appellee Land Bank. *See Exhibit 3.*

Moreover, Appellant cannot establish its inverse condemnation claim as any damage that allegedly arose from the demolition at issue was limited to the exterior siding on the side of the house and an outdoor floodlight mounted to the side of the house. There is no evidence establishing that any other damage alleged by the Appellant was caused by the demolition as opposed to the frost heave that winter after the Appellant voluntarily terminated the utilities and vacated the property. Stated *supra*, Mr. O'Neill testified that he observed damage to the Plaintiffs' property but was unable to relate any of the damage to the subject demolition. *See Exhibit 5*, p. 11, Line(s)11-21.

Appellant is clearly using this cause of action to hold Appellee Land Bank liable for the Appellant's own voluntary actions. For this reason and the reasons stated *supra*, any damage allegedly caused by the subject demolition is, at best, *incidental* to the damage Appellant voluntarily caused itself. Consequently, Appellee Land Bank's actions do not constitute a "taking" as it did not set in motion any destructive forces, and Plaintiffs' inverse condemnation claims were properly dismissed accordingly.

C. Appellant's Application fails to set forth any argument that the second element for an inverse condemnation claim is met.

Despite Appellant's acknowledgement that the two (2) above-referenced elements set forth in *Blue Harvest supra* must be met, the instant Application fails to set forth any argument, whatsoever, establishing that Appellee Land Bank's actions satisfy the second element for its inverse condemnation claim.

"The Takings Clause under the Fifth Amendment is substantially similar to the Takings

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Clause of the Michigan Constitution, and the two provisions should generally be interpreted coextensively." *Ypsilanti Fire Marshall v Kircher*, 273 Mich App 496, 516, n. 22, 730 NW2d 481 (2007)(*citing Tolksdorf v Griffith*, 464 Mich 1, 2, 626 NW2d 163 (2001); *Peterman supra*, at 184 n. 10. As such, Appellant must establish that Appellee Land Bank "abused its legitimate powers in affirmative actions directly aimed" at Appellant's property. *Blue Harvest supra*, at 277. The Appellant's Complaint however, merely alleges that "determinations and decisions" between the City and Defendant Land Bank establish a "taking" on behalf of Defendant, Land Bank. *See Exhibit 1,* at p. 3-4.

Neither Appellant's Complaint, nor the instant Application, establish how Appellee Land Bank's actions constitute a *taking*. Stated *supra*, there is no evidence that Appellee Land Bank, was responsible for administering any of the demolition process for the adjacent property. More importantly, the record is devoid of any evidence establishing that Appellee Land Bank *specifically directed* any affirmative action toward the Plaintiffs' property. *Blue Harvest supra*, at 277.

All subject demolition was specifically directed to occur at the adjacent property, not the Plaintiffs' property. There is further no evidence that Appellee Land Bank, abused any of its legitimate powers. *See Exhibit 6*. Indeed, the MOU clearly establishes that Appellee Land Bank was not involved with any respect of the subject demolition aside from owning the adjacent property. Simply stated, there were no affirmative actions by Appellee Land Bank that directly affected the Appellant's property. Therefore, the lower court correctly affirmed the trial court's Order dismissing Appellant's inverse condemnation claims against Appellee Land Bank.

II. THE COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S ORDER APPLYING THE *PRICE v HIGH POINTE OIL COMPANY* MEASURE OF DAMAGES FOR APPELLANT'S BREACH OF THIRD-PARTY CONTRACT CLAIM.

Appellant is attempting to overturn the trial court's Order prohibiting it from offering

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argument, evidence and/or testimony with respect to the cost of rebuilding the subject property as the same is irrelevant and overly prejudicial. Appellant intended to rely on the testimony of its experts, including but not limited to the cost estimate from its expert at Bailey Construction to establish the measure of damages. *See Exhibit 13*, Bailey Construction Replacement Cost Estimate. The nature and cost of rebuilding the subject property is irrelevant and overly prejudicial to Appellant's cause of action as it does not have the tendency to make a fact more or less true with respect to the correct measure of damages for the breach of third party contract claim. The lower court and trial court correctly relied on *Price v High Pointe Oil Company, Inc.*, 493 Mich 238, 828 NW2d 660 (2013) to agree with the same.

In *Price v High Pointe Oil Company, Inc.*, this Honorable Court held that the appropriate measure of compensatory damages for negligent destruction of property is the difference in fair market value before and after the alleged damage, if the cost of repair exceeds the fair market value. *Id.* at 244. This Court stated as follows:

> If injury to property caused by negligence is permanent or irreparable, [the] measure of damages is [the] difference in its market value before and after said injury, but if [the] injury is reparable, and [the] expense of making repairs is less than [the] value of [the] property, [the] measure of damages is [the] cost of making repairs.

Id (*quoting O'Donnell v. Oliver Iron Mining Co.*, 262 Mich. 470, 247 N.W. 720 (1933)). *Price* makes it clear that cost for a total tear down and rebuild of the subject property is excluded from damage calculations for a property damage claim. Appellant alleges that the lower court and trial court erred in relying on *Price* with respect to its breach of third-party contract claim because the measure of damages is different than the measure of damages for Appellant's negligence claim.

Appellant fails to set forth any authority supporting this argument aside from case law with respect to the most basic contract principle that a breaching party must place the non-

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breaching party in the same position had the alleged breach never occurred. Despite Appellant arguing that it should be placed in the same position had the alleged breach never occurred, Appellant then contradicts itself by arguing that its damages would necessarily include the added costs of improvements to bring the existing structure up to current building codes.[1]

Appellant is not requesting that it be placed in the same position; it is requesting that it be unjustly enriched and placed in a better position than it was before the breach by including the exorbitant costs for building a new house with improvements unrelated to the subject demolition. Appellant wants to capitalize on this lawsuit to get a "Six Million Dollar Man" house that is built better and stronger than it was before. Again, Appellant fails to set forth any case law allowing for this measure of damages for a contract claim. This is further not a measure of damages that would arise naturally from any alleged breach.

Should this Honorable Court find that Appellant is an intended third-party beneficiary, it has no expectancy under the contract other than the benefit that Appellee Rohde Bros. "take care to protect abutting properties." *See Exhibit 3*. There are no additional duties identified in the contract not already imposed by the operation of common law. *See Exhibit 3*. Absent an express contractual promise to exercise "care to protect abutting properties," Appellee Rohde Bros. was already under a duty to do exactly that under common law tort principles. *Loweke v Ann Arbor Ceiling & Partition Co., LLC*, 489 Mich 157, 172 (2011); *Courtright v Design Irr., Inc.*, 210 Mich App 528, 530, 534 NW2d 181 (1995). As such, Appellant has no contractual expectancy beyond the expectancy of the common law duty that Appellee Rohde Bros. would not act negligently.

Clearly, Michigan law instructs that according to the *O'Donnell* rule cited in *Price*, the

[1] Similar to the egg shell negligence theory for an injured plaintiff with preexisting injuries, Appellant further argues the Appellee Rohde Bros. must take the subject property as it finds it. Appellant fails to cite any authority in support of this argument, and Appellees are unaware of any case law in Michigan that makes Appellee Rohde Bros. liable for the costs of bringing the subject property up to current building codes, when the failure to do the same was solely caused by virtue of Appellant's ownership of the subject property.

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correct measure of damages in this matter for both the negligence and the breach of third-party contract claims is the same: the difference in fair market value of the subject property before and after the demolition carried out by Appellee Rohde Bros, if the damage is not repairable. *Price supra*, at 244. A cursory review of this estimate shows that it is merely evidence for the cost of building a new two-story structure for the subject property to bring it up to current building codes, not the difference in fair market value for the existing structure. *See Exhibit 13.*

The subject estimate further fails to address depreciation for the subject property. *See Exhibit 13.* Absent depreciation, the subject estimate is not a replacement for the existing structure, but the price to replace a theoretical new house. *Strzelecki v. Blaser's Lakeside Indus. of Rice Lake, Inc.*, 133 Mich. App. 191, 194, 348 N.W.2d 311, 313 (1984). In *Strzelecki*, this Honorable Court stated as follows:

> Clearly, replacement cost alone, without any deduction for depreciation, is not sufficient evidence of market value at the time of the loss. If replacement cost without depreciation was allowed, the plaintiff would recover an amount as if the property were new at the time it was destroyed.

Strzelecki supra, at 194-95 (*citing State Highway Comm'r v. Predmore,* 341 Mich 639, 642, 68 NW2d 130 (1955); and *Bluemlein v. Szepanski,* 101 Mich App 184, 192, 300 NW2d 493 (1980), *lv. den.* 411 Mich. 995 (1981)). Consequently, evidence with respect to the cost of replacement standing alone, including but not limited to the Bailey estimate, is irrelevant pursuant to MRE 402 and MRE 403, and the trial court correctly prohibited the same.

Moreover, it is well-established in Michigan that the same measure of damages is used for similar factual situations in construction contract claims. Specifically, the measure of damages is determined by the amount to correct the subject defect. If the cost of correction exceeds the fair market value of the house, the measure of damages is the difference in the fair market value before and after the subject breach.

In *Caradoma v Thorious*, 17 Mich App 41, 169 NW2d 179 (1969), the lower court stated

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as follows:

> But, where the defects are such that they cannot be remedied without the entire demolition of the building, and the building is worth less than it would have been if constructed according to the contract, the measure of damages is the difference between the value of the building actually tendered, and the reasonable value of that which was built.

Caradoma, 17 Mich. App. at 45 (*quoting Gutov v. Clark*, 190 Mich. 381, 387, 157 N.W. 49, 51 (1916)). As such, *Caradoma* sets forth the same measure of damages as *Price supra*, wherein the difference in fair market value of the subject property is used when the cost of repair exceeds the fair market value. Consequently, the lower court and trial court correctly relied on *Price supra* to determine the proper measure of damages in this matter.

III. THE COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S ORDER THAT DEPRECIATION IS AN ELEMENT OF DAMAGES, WHICH MUST BE PROVED BY THE PLAINTIFF.

Appellant alleges that depreciation is an affirmative defense that must be pled by a defendant not an element of damages. Again, Appellant cites no case law establishing that depreciation is an affirmative defense. Conversely, it is established law in Michigan that replacement cost alone, without any deduction for depreciation, is insufficient evidence of fair market value at the time of loss. *Bluemlein supra*, at 191-194.

In other words, it would be in error to instruct the jury and admit evidence and/or testimony on replacement cost because it would allow the Plaintiffs to recover an amount equal to what they would have received if the subject property was brand new when the alleged damage occurred. *Id.* at 190-192. Clearly, depreciation a component of establishing fair market value of the subject property. *Id.* Fair market value in turn is the measure of damages for claims involving the destruction of property that must be proved by the plaintiff. *Price supra.* Consequently, depreciation is an element of damages that must be proved by Plaintiff, not an affirmative defense.

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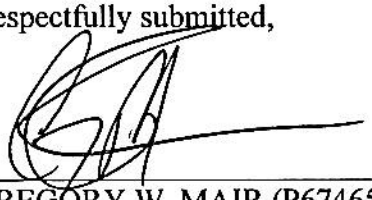
RELIEF REQUESTED

WHEREFORE, for the reasons stated, Appellees respectfully requests that this Honorable Court DENY Appellant's Application for Leave and AFFIRM both the lower court and trial court.

Respectfully submitted,



GREGORY W. MAIR (P67465)
Attorney for Defendants/Appellees
300 St. Andrews Rd., Ste. 302
Saginaw, Michigan 48638

Date: June 19, 2017